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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM—1950

No. 698

FRANK SEIDEN, MILTON SEIDEN and LEON SEIDEN,

Petitioners,

against

JESS LARSON and PAUL L. MATHER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice of the Supreme Court and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review its final judgment herein (R. 83).

Opinion Below

The opinion of the Court of Appeals (R. 75-82) is as yet unreported. The District Court wrote no opinion.

Jurisdiction

The final judgment of the Court of Appeals was entered on March 15, 1951 (R. 83). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented

The Court of Appeals gave judgment to respondents on the ground that this is an action against the United States. The questions on which the Court of Appeals ruled and which are here presented are:

1. Where plaintiffs who have standing to sue seek to restrain an officer from disposing of land in a manner different than that which Congress has specifically directed, is the suit nevertheless against the United States if (a) title to the land is in the United States and (b) plaintiffs' ultimate objective is to acquire that land?

2. Where plaintiffs who have standing to sue seek to restrain an officer from disposing of land in a manner different than that which Congress has specifically directed, is the suit nevertheless against the United States if the officer acts contrary to the statutory mandate because of an error of law on his part in construing the statutory mandate?

The Court of Appeals answered both questions affirmatively and, therefore, it did not rule on the following two questions which present the merits:

1. Was petitioners' property "war housing" and so within the exception to the former owners' preference created by the Surplus Property Act of 1944, Act of October 3, 1944, c. 479, sec. 23, 58 Stat. 777, 50 U. S. C. App., sec. 1632?

2. If petitioners' former property was not "war housing" have petitioners, by virtue of expiration of the Surplus Property Act while this action was pending, lost the preference to which they were entitled when the officer offered the land for sale and when this action was instituted?

Statutes Involved

The pertinent statutory provisions are printed in Appendix A, *infra*, pages 1a to 3a.

Statement

A. Nature of the Action

Petitioners seek to restrain respondents from conducting a public sale of petitioners' former real property unless such sale is made subject to the statutory preference granted to former owners under the Surplus Property Act of 1944 (R. 4-6). Petitioners' standing to sue, under that Act, is conceded by the Court of Appeals (R. 77).

The Act, devised primarily to govern disposition of World War II surplus, provides as follows with respect to real property acquired by the United States after December 31, 1939: "when [such surplus real] property is to be disposed of by the United States" the former owner "shall be given notice" and "shall be entitled to purchase such property, in substantially the identical tract as when acquired from such person at private sale at any time during the period of ninety days following such notice" (App. A. 2a). The re-acquisition price is fixed at the price paid by the United States to the owner when the United States took the property, increased to the extent of any improvements since made and decreased to the extent of any damage since done to the property (*id.* 3a).

B. The Facts Essential to This Petition

Petitioners, prior to September 8, 1942, owned the Lido Beach Club, a completely integrated summer resort, situated at Lido, Long Island. The premises consisted of 169 continuous acres, on which there were a hotel, an ocean beach, a golf course, swimming pools, tennis courts and many other facilities (R. 11-4).

On September 8, 1942, the Navy seized possession of the premises and instituted condemnation proceedings through which the United States acquired title in April, 1945 (R. 40).

After the war, the Navy ceased using the property. By revocable lease, it allowed the United Nations to use the southerly 54 acres on which the clubhouse or hotel stood and by revocable permit it allowed the New York State Housing Division to take over the northerly 115 acres so that it might alter certain cinder-block barracks which stood on a part of that area for temporary, emergency veterans' post-war housing (R. 15, 42).

Thereafter, in May, 1947, the Navy declared the whole parcel surplus as an unit and, under the Act respondent Larson, as Administrator of the War Assets Administration, took control of the property (R. 41).

Shortly thereafter, the United Nations surrendered its portion. Respondent Larson then offered that part for sale, recognized petitioners' priority and resold to them at the statutory price (R. 15-6). The only witness who claims personal knowledge says it was understood, at the time, that at the end of the State's tenure, the other part of the property would be similarly reconveyed (R. 16).

Without going into detail, it may be said that the division of the property cut petitioners' golf course in two. The value of the resort had long been in its integration of facilities (R. 20). Without the course, one of the five best in the world, the resort was dismembered (R. 13).

When, in 1949, respondents decided to sell the northerly part, they refused to recognize petitioners' priority and offered the property to the highest bidder (R. 9, 20-8).

Petitioners do not seek to prevent the sale which respondents elected to make; they do not seek to curtail the State's occupancy period but are ready to buy subject thereto; but they do seek to restrain a sale which puts them on a parity with the general public so that if they are not the highest bidder, they are left with a part of a resort or are required to pay some speculative purchaser a high price to have their property made whole. Congress dictated that they should not be placed in this position.

C. The Justification Claimed for Respondents' Conduct

To the rule of former owners' preference, Congress made certain exceptions, among them being property which, on the date it was declared surplus, constituted "war housing". Respondents claim that the northerly 115 acres were, on May 5, 1947, "war housing".

The Navy had built a number of structures of temporary cinder-block construction both north and south of the road—warehouses, mess hall, dispensary, target ranges, etc. and included were some barracks buildings.

War Assets has ruled that such barracks buildings were not war housing. *O'Harra* v. *Littlejohn,* 69 F. S. 274, 275 (D. C., D. C. 1946). But respondents contend that alterations made by New York State in 1947, two years after the war, made the property "war housing".

Briefly, this is what New York did to the property: within a fenced off area of 23.8 acres, there stood 23 barracks buildings; at a cost of $2,000 a unit, New York partitioned the long barracks halls into compartments, installed plumbing on the inside and erected wooden staircases on the outside to give separate access to each unit; each unit measured overall approximately 28′ x 37′ (R. 10, 32-3, Plf's. Ex. I, Defs.' Exs. D, E). Pictures of the outer structures appear as Exhibit I annexed to the affidavit of Milton Seiden and Exhibit L annexed to that of Israel Flapan. Because no return is necessary on the investment, the apartments rent for $38 a month (R. 35). They are now an eyesore and bear no resemblance to an economic investment and bear no resemblance to the "war housing" which was constructed during World War II (R. 17, 36-7).

D. The Adjudications Below

The District Court, without memorandum or opinion, dismissed the complaint and granted respondents summary judgment.

The Court of Appeals affirmed. It held that since (a) title is in the United States and (b) the "ultimate relief" sought by petitioners "could hardly be obtained without" either affirmative action by the "sovereign" or disposition of sovereign property, this is an action against the United States. The conclusion, we submit, is contrary to the applicable decisions in this Court in that it fails to distinguish between enforcing compliance with specific directions of Congress and compelling action where Congress has given no specific directions.

As "an alternative ground of decision" the Court held that if respondents are acting contrary to statute but so act through "an incorrect decision as to law or fact", the action is against the United States. For this conclusion, the Court relies on *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949). We submit that again the Court has failed to distinguish between an error of law by respondents in construing the statutory mandate and an error by them as to some common law right connected with action which is within the scope of their statutory authority. In the cited case, the claim was a breach of contract by an officer acting within his delegated powers; here the wrong consists of acting contrary to the mandate of Congress. Thus, again the determination here is in conflict with the applicable decisions of this Court.

Specification of Errors to Be Urged

We beg to refer to the Questions Presented, *supra*. We submit the Court was in error:

1. in holding that this is an action against the United States;
2. in refusing to pass on the merits, and
3. in refusing to enjoin defendants from disposing of petitioners' former property without first offering it to petitioners at the statutory price.

Reasons for Granting the Writ

The Court of Appeals for the District of Columbia has decided a) a federal question and b) a question of general importance in a way probably in conflict with the applicable decisions of this Court.

The Court will note from the cases cited in the opinion of the Court of Appeals and in our Argument that, over a period of years, suits to compel an officer to deal with the sovereign's property in accordance with statute have been plentiful. The fact that the Court of Appeals (in footnote 11, R. 79) also cites several very recent cases in the lower Courts shows the frequent recurrence of the situation.

As the Government's functions have expanded, the property transactions of the United States—acquisition, management and disposition, as well—have multiplied. The Federal Property and Administrative Services Act of 1949, Act of June 30, 1949, c. 288, 63 Stat. 378, 41 U. S. C. Sec. 201, was enacted to cope with the problem. The Government will continue to deal with the individual in matters involving Government property. As the law is laid down by the Court of Appeals, the citizen is without specific redress with respect to such property even though Congress gives the citizen plain, indisputable rights. For, if the incidence of title ends the matter or if the officer by misconstruing the Act ties the hands of the Courts, the citizen deals at his peril; and, often, his dealing, as in the present case, is wholly involuntary.

Again, the opinion below applies even when Government property is not involved if the officer misconstrues the mandate of Congress. This Court, we submit, in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949) established a clear formula to govern the cases of "common law wrongs". But if the doctrine there, that an error of law by an officer who acts within his authority is not remediable, is to be expanded so that an officer who mis-

reads the statutory mandate is also beyond the law, it is new doctrine which will surely lead to serious consequences.

Thus, if, as we believe, the Court of Appeals is in error, it is highly important that the writ be granted, for reversal would not merely rectify a gross injustice here but would clarify the law in the numerous cases in which it is desirable that an officer act as the Statute has directed him to act.

ARGUMENT

POINT I

The first ground of decision below is in conflict with a number of cases in this Court where similar specific relief was granted despite title in the sovereign.

This Court has often granted specific relief against an officer who failed to carry out the statutory mandate, though that relief affected the sovereign's property.

(a) In *Crittenden* v. *Rolston*, 120 U. S. 390 (1887), the State of Missouri held mortgages on railroad property. The action was brought to restrain officers of the State from selling the mortgaged property to others. Appellants' objective was to have the officers assign the mortgages to appellants' designees. Not only did this Court affirm the granting of the injunction but it also directed a determination of whether the facts had occurred upon which "the Governor can be compelled to execute [to petitioner's designees] the assignment which has been provided for [in the Statute]" (p. 411).

(b) In *Pennoyer* v. *McConnaughy*, 140 U. S. 1 (1891), the decree restrained State officers from selling lands owned by the State in violation of appellee's rights.

(c) In *Noble* v. *Union, etc. Co.*, 147 U. S. 165 (1893), officers of the United States were enjoined from revoking a right of way granted appellee over land belonging to the United States.

(d) In *Payne* v. *Central, etc. Co.*, 255 U. S. 228 (1921), this Court enjoined the Secretary of Interior, *et al.* from cancelling selections of land although title thereto was in the United States and patents from the United States would be required in order that respondent should obtain the title it sought (p. 234).

(e) To the same effect was *Santa Fe, etc. Co.* v. *Fall*, 259 U. S. 197 (1922), in which there is the characteristically lucid opinion of Mr. Justice HOLMES.

The following are cases where mandamus issued to compel an officer to pay money out of the public treasury in order to conform with Statute:

(a) *Smith* v. *Jackson*, 246 U. S. 388 (1918), affirming a comprehensive opinion in 241 F. 747, 762-3 (CCA 5, 1917).

(b) *McCarl* v. *Cox*, 8 F. 2nd 669 (CCA D. C., 1925), c.d. 270 U. S. 652 (1926).

(c) *Miguel* v. *McCarl*, 291 U. S. 442 (1934).

Similar in principle are *Board of Liquidation* v. *McComb*, 92 U. S. 531 (1876), where State officers were enjoined from issuing the State's own bonds, and *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (1912), where this Court took jurisdiction of an action to enjoin an officer who was acting under the exclusive federal jurisdiction over navigable waters; relief was denied on the merits.

Thus, where a statute is to be complied with, it should be clear that the incidence of title together with ultimate affirmative action by an officer in order to comply, do not convert the action against the recalcitrant officer to one against the sovereign.

The Court of Appeals, we submit, in reaching its conclusion, misread footnote 11 in the majority opinion and a sentence in the dissenting opinion in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949), hereinafter called the *Larson* case. That footnote reads:

> "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. North Carolina v. Temple, 134 U. S. 22, 33 L. ed. 849, 10 S. Ct. 509 (1890)."

The Court of Appeals has read the clause "will require affirmative action by the sovereign" as if it read "will require affirmative action by the officer" and the clause "disposition of unquestionably sovereign property" as if it read "disposition by an officer of unquestionably sovereign property".

That this is not what this Court meant in its footnote is apparent from a reading of *North Carolina* v. *Temple*, the case cited in that footnote. There, the State of North Carolina, by legislation and by constitutional amendment, had directed that neither the principal nor the interest on bonds issued in the name of the State in "carpet-bag" days should be paid. Plaintiff-bondholders sued to compel a State officer to levy a tax to pay these bonds despite the statutes and constitutional amendment to the contrary. In dismissing the bill, this Court rested its decision on the authority of *Louisiana* v. *Jumel*, 107 U. S. 711 (1883), where the same situation existed. The ground of decision in those cases is given by Mr. Chief Justice WAITE in *Crittenden* v. *Rolston*, 120 U. S. 390, 411 (1887):

> "It is next contended that this suit cannot be maintained because it is in its effect a suit against the State, which is prohibited by the Eleventh Amendment of the Constitution of the United States, and *Louisiana* v. *Jumel*, 107 U. S. 711 (27:448), is cited in support of this position. But this case is entirely different from that. There the effort was

> to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the State. The law makes it his duty to assign the liens in question to the Trustees when they make a certain payment."

Thus, it is clear that when Mr. Chief Justice VINSON referred, in footnote 11 of the *Larson* case, to affirmative action by the sovereign, he meant just that—*i. e.*, action by Congress and the President—and not affirmative action by an officer who is designated to carry out the statute which the sovereign has already enacted. So, too, by "disposition of unquestionably sovereign property" he meant a disposition for which Congress would have to provide, not a disposition which an officer was clearly required, by Act of Congress, to make. Similarly, the sentence taken by the Court of Appeals from the dissenting opinion of Mr. Justice FRANKFURTER (R. 79) is an iteration that an action cannot be brought *in invitum* against the United States with respect to its property in its possession; it should not be read to mean that where Congress has affirmatively directed a specified disposition of Government property and the officer refuses to carry out the mandate, the mere incidence of title in the United States ties the hands of the courts. Otherwise all the cases we cited at the beginning of this Point would have to be deemed overruled.

The other cases cited and quoted by the Court of Appeals (R. 78-9) are not in point; none of them involves an action against an officer who defies the legislative command. In *Minnesota* v. *United States*, 305 U. S. 382 (1939), Congress had consented that condemnation proceedings might be brought by the State in Federal Courts with respect to land owned by the United States for the benefit of Indians; this Court held that that was not consent to condemnation in a State Court; the clause quoted by the Court of Appeals

(R. 78) from this Court's opinion there meant simply that an *in invitum* suit as to property in which the United States has an interest, as guardian, is a suit against the United States.

In the three *Hitchcock* cases (R. 78) the question was whether an officer who acted pursuant to an Act of Congress could be restrained where appellants claimed conflicting rights had been conferred on them by earlier Acts; the officer was not flouting Congress but conforming to its command.

The quotation (R. 78) from *Land* v. *Dollar*, 330 U. S. 731 (1947), is said to "indicate" that where title is in the United States suit to enforce a right claimed under an Act of Congress cannot be maintained (R. 78). But this Court did not say that. The Court said that it could not go into all the ramifications of *United States* v. *Lee* (p. 737); and that a number of cases in several categories cited by petitioner were distinguishable from *Land* v. *Dollar*. The six cases referred to (330 U. S. 738) did not involve disobedience by an officer. In the *Cunningham* case, no statute had conferred the right plaintiffs claimed and this Court said "No one sued has any personal interest in the matter or any official authority to grant the relief asked" (109 U. S. 446, 457). We discussed the three *Hitchcock* cases in the last paragraph above. In *Louisiana* v. *Garfield*, the Court said Congress had manifestly not granted to the State that which it claimed an Act of Congress had granted it (211 U. S. 70, 77). In *Morrison* v. *Work*, various relief was denied on various grounds, and the Court distinguished cases in which it was sought to enjoin an officer from contravening a statutory direction (266 U. S. 481, 486).

In *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371 (1945), this Court said, through Mr. Justice Black, that "Certainly the action which the Secretary proposed to take is not a violation of any express command of Con-

gress" (p. 374); in fact the action was pursuant to a command of Congress (p. 372).

We respectfully submit that again and again specific relief has been granted despite the incidence of title in the United States and despite the fact that the ultimate interest of the plaintiff was in an affirmative disposition of land by the United States, and that it could not have been intended in the *Larson* case to overturn these precedents when Congress, the sovereign, has acted and it is sought merely to have the officer carry out the mandate of Congress.

If the *Larson* case is construed to grant immunity from suit to Government officers whenever they deal with property of the United States, then a vast field is opened for irresponsibility on the part of such officers. Such a matter is of grave public importance and we respectfully submit that certiorari should be granted.

POINT II

The second ground of decision below is in conflict with *Larson* v. *Domestic & Foreign Commerce Corp.*

A. The holding of the *Larson* case does not extend to an error of law by the officer in construing his own statutory authority.

The Court of Appeals gave an "alternative ground" for holding the suit to be against the United States (R. 79). That ground is that the Administrator was "empowered" by Congress to construe the words "war housing"—normally a judicial function—and if he erred in his construction, that was an error which was within the scope of his authority. For this, the Court quotes from the *Larson* case that it "is no less official action when 'based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so'. 337 U. S. at 695" (R. 82).

Before we refer to the statute to determine whether the Administrator was made a court as well as an administrator (pp. 15-20) and before we cite the uniform definitions of "war housing" (pp. 20-3), it may be well to point out what a far reaching extension of the *Larson* doctrine is inherent in the Court of Appeals position. The *Larson* case did not involve the construction by the officer of his own terms of authority. Here, an executive officer is held empowered to determine what powers Congress gave him and if he erred in that determination it is held there is no way of preventing his unwarranted action. Surely, there should be very clear language on the part of Congress before it is determined that it intended to by-pass the judiciary and to give such unbridled freedom to the Administrator. In the *Larson* case the statute gave the Administrator virtually unlimited powers to conduct a sales program as to personalty—to sell "to such extent, at such times, in such areas, by such agencies, at such prices, upon such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act" (Surplus Property Act, etc., Sec. 4, 50 U. S. C. App. sec. 1613). The statute contained virtually no limitations on these broad powers. The Administrator, acting within these broad powers, construed a contract which he had made. This Court denied an injunction, holding that construction of a contract, right or wrong, was within the scope of his authority. That is a far cry from a holding that it is immaterial whether he is right or wrong in determining what the scope of his statutory authority is.

In the *Larson* case this Court distinguished, time and again, the authorized act of an officer and the act which was contrary to statute. When "The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden * * * His actions are *ultra vires* his authority and therefore may be made the object of specific relief" (337 U. S. at 689). But the Court of Appeals says that here

respondents were authorized because Congress gave respondents the authority to construe the statute. We respectfully submit a) that the statute gives no such authority and b) that the *Larson* rule would not apply, in any event, to an officer who "construes" his own authority into something at variance with Congress' mandate.

B. Congress delegated to the Administrator the power to make determinations of fact, not of law.

From the beginning, Congress made very specific and meticulous provisions with respect to real property.

In 1944, the only exceptions made in Section 23 were "war housing, industrial plants, factories, or similar structures and facilities, or the sites thereof, or land which the Board determines is essential to the use of any of the foregoing (App. A, *infra*, p. 1a). Thereunder, respondent Larson's predecessor, General Gregory, denied preferences to former owners of hotels on the ground that hotels were "similar structures and facilities" to industrial plants and factories. This, obviously, was not the intention of Congress and the statute was accordingly amended in 1946. The House Committee wrote:

> "In the opinion of the Committee, this interpretation is wholly unjustified, but the fact that it has been made and has not been changed requires that Section 23(a)(1) of the act be re-written so that it cannot be misunderstood."*

Congress then separated sharply properties which should go back to the former owners and those which should not, and the amended section reads as follows:

> "As used in this section—
>
> (1) The term 'real property' means property consisting of land, together with any fixtures and improvements thereon (including hotels, apartment houses, hospitals, office buildings, stores, and other

* House Misc. Reports, 79th Cong. 2nd Sess., Vol. IV, Rep. No. 2337, p. 2.

> commercial structures) located outside the District of Columbia, but does not include (A) commercial structures constructed by, at the direction of, or on behalf of any Government agency, (B) commercial structures which the Administrator determines have been made an integral part of a functional or economic unit which should be disposed of as a whole, and (C) war housing, industrial plants, factories, airports, airport facilities, or similar structures and facilities, or the sites thereof, or land which the Administrator determines essential to the use of any of the foregoing; and"

There are several significant aspects to that paragraph. First, Congress, in clear words, divided those matters in which the Administrator's judgment was to apply from those where no judgment was applicable. Congress could have said in subdivision (B) "commercial structures which have been made an integral part of a functional or economic unit which should be disposed of as a whole"; and it could have said "land which is essential to the use of any of the foregoing". But it did not say that; it said "commercial structures which the Administrator determines have been made an integral part, etc." and "land which the Administrator determines essential etc.". If such a broad grant of power as the Court of Appeals assumes had been made, these clauses would have been wholly unnecessary. Second, both those matters in which his determinations are final are factual. It is a matter of judgment, not of definition, whether buildings should be sold together or whether additional land is needed in connection with the structures. Third, Congress used as specific terms as it could; where it used a general term—"commercial"—it went out of its way to label the kinds of commercial properties which came to mind: "hotels, apartment houses, hospitals, office buildings, stores".

Certainly, no power to make new definitions can be deduced from this paragraph. The Administrator was given the usual administrative powers to determine factually

whether properties fell within accepted definitions of terms used by Congress, not the extraordinary power to change the usual meaning of terms used by Congress.

The Court of Appeals draws its conclusions as to a broad grant of authority from the authority given the Administrator in Sec. 23(c) to classify property (App. A, *infra*, p. 2a) and from the term "similar structures and facilities". But a brief reference to the section and its history will show the conclusion is not justified.

As the act stood originally in 1944 he was directed to classify only "as agricultural, grazing, forest, mineral, or otherwise, as it may deem advisable". This was due to the historical background of the Senate bill in which, as originally drawn, agricultural land was to be disposed of by the Secretary of Agriculture, grazing and forest land by the Secretary of Interior, and mineral rights were always to be reserved to the Government.* Also, certain preferences in the final Act applied to agricultural land.** It should be noted that he was not told to classify properties as industrial or war housing for Congress did not suspect difficulties would arise there any more than if it had said "Buick automobiles" or " Chase National Bank branches."

In 1946, as the Court of Appeals points out, the statute was amended so that the Administrator was directed to classify property based on its "highest and best use" at the time it was reported surplus and he was so directed to classify even though that determination might make the property Section 23 or non-Section 23 property. The origin of the "highest and best use" clause appears clearly in the report of the House Committee. When Congress was ready to make sure that hotels should be turned back to their former owners, Gen. Gregory defended his opposition by saying that in many instances hotel properties had been

> "largely converted to hospitals, which conversion necessitated alterations entirely changing the char-

---

* S. 2065 (1944).
** App. A, p. 3a. Also Sec. 23(e) and (i).

> acter of the building and rendering it unsuitable for its former use without extensive additional alterations".*

Thus, he pointed out that the government would have to surrender a hospital which the owner never had and it would have to allow him on the price the cost of reconverting to a hotel. That is how the "highest and best use at the time it is reported as surplus" came into the Act. The Administrator was directed to apply the Congressional mandate in accordance with the definition into which the property fit at the time it was declared surplus and not when taken.

That command of Congress has no application here. We do not deny that if it was "war housing" in 1947, petitioners had no preference though it was vacant land in 1942. The "highest and best use" in 1947, a year of peace and continued demobilization, was not for "war housing" and there is no evidence that Congress gave respondents the power to say it was.

Again, the Court says that if respondent Larson could not call it "war housing" he might reasonably call it "similar structures and facilities" under the clause which excepted

> "war housing, industrial plants, factories, airports, airport facilities, or similar structures and facilities" (Sec. 23(d)).

The shortest and best answer to this is the action of respondent Larson and his predecessor, General Gregory.

General Gregory defined "similar structures and facilities" as follows:

> " 'Similar structures and facilities' as used above shall include structures and facilities classified by the Administrator as (i) commercial, (ii) roads and local transportation, (iii) airport, (iv) railroad,

* House Misc. Reports, 79th Cong. 2nd Sess., Vol IV, Rep. No. 2337 (pp. 3-4).

transportation and pipe line, (v) utility and communications and (vi) institutional where there are improvements which render the property suitable for disposition and use for health or educational purposes" (11 Fed. Reg. 2644-5).

Respondent defined "war housing and similar structures and facilities" as follows:

> "f. (3) *War Housing and Similar Property.* War Housing and similar structures and facilities, and the sites thereof and land which is determined to be essential to the use of such property.
>
> 'War Housing' means real properties improved with housing structures, acquired or constructed by the Government subsequent to September 8, 1939, either (1) for the purpose of housing servicemen, war workers, and their families, or (2) by the use of such funds earmarked or appropriated for the housing of persons engaged in national defense activities, and their families" (R. 62).

It will be noted that respondent's definition of "war housing and similar structures and facilities" is verbatim his definition of "war housing" (*infra*, pp. 22-3). In other words, respondent well realized that "war housing" was war housing and that the phrase "similar structures and facilities" modified factories, etc. but did not modify the term "war housing".

This case is similar to *United States* v. *Idaho*, 298 U. S. 105 (1936). In question was the Interstate Commerce Act which gave the I. C. C. jurisdiction to authorize abandonment of tracks other than "spur * * * tracks, located * * * wholly within one State". The I. C. C. determined that the track was a "branch" and not a "spur" and allowed abandonment. An injunction was granted by this Court on the ground that no such power to construe the

act of Congress had been given to the I. C .C. Mr. Justice BRANDEIS wrote at page 109:

> "Appellants object that, since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive."

But, the Court concluded differently, continuing:

> "For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a state commission."

In sum, the Court of Appeals has assumed (a) that Congress gave the Administrator authority to determine his own jurisdiction and (b) that this Court's opinion in the *Larson* case immunizes an error on his part in determining his jurisdiction from specific relief. We submit that both are wrong and that both, particularly the latter, justify certiorari.

C. Here respondent was acting clearly outside the scope of his authority.

"War housing" is a term of clearly established meaning. It has been so often defined, by respondent Larson as well as by others, that its meaning is not in doubt.

For example, Senate Report 1286, which accompanied the Housing Act of 1950, contrasts "war housing" with the property here involved. Under "Disposal of War and Veterans' Housing" that Report reads:

> "The *war housing was construction* with Federal funds under the authority of the Lanham Act (Public Law 849, 76th Cong., as amended), and related statutes, *during the war and the immediate prewar period* for the purpose of providing accommodations for workers in essential war and defense industries. * * * All of the war housing was owned by the Government, which was responsible for its operation and management."
>
> * * * *

> "The *temporary veterans' reuse housing was provided just after the war* under the authority of Title V of the Lanham Act as a temporary expedient to meet the housing needs of veterans and their families. Most of this housing was produced through the moving and conversion of temporary war housing and barracks buildings, either by the Federal Government or by the municipalities, educational institutions and non-profit organizations to which they were made available." (Italics ours.) (2 U. S. Cong. Serv. of 1950 at p. 2048.)

In fact, if this were "war housing" it would not be in respondents' hands for disposition. The following colloquy on the Senate floor preceded adoption of the Act in 1944:

> "Mr. Pepper. Mr. President, I am not sure I did not overlook the provision about war housing. Is that covered by the terms of the Lanham Act?
>
> Mr. Johnson of Colorado. Yes, it is. War housing will be handled by its own agency and will be excluded from the matter of surplus property disposal under the Bill" (90 Cong. Rec. 7936).

The exception of "war housing" was inserted on the suggestion of John B. Blandford, Jr., National Housing Administrator, who advised the Committees in charge that unless "war housing" were excepted from the Surplus Property Act, the latter would be in conflict with the Lanham Act and the two administrators would have jurisdictional problems because Congress had provided for the method of disposition of "war housing" by the Housing Administrator when it had originally appropriated funds for the erection of "war housing".*

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* "Summary of Recommendations Submitted on Surplus Property Legislation" by War Contracts Committee to Senate Committee on Military Affairs, 78th Cong., 2nd Sess., Senate Subcomm. Print No. 5, June 5, 1944 and Hearings before Subcomm. of the Comm. on Public Bldgs. and Grounds, H. Rep., 78th Cong., 2nd Sess. "Bills relating to Disposition of Surplus Property", p. 3.

President Roosevelt, in 1942 (88 C. R. 4656) and in 1943 (89 C. R. 4396), in Messages to Congress had referred repeatedly to "war housing" as housing built "in time of war", in "areas of expanding war production", "in relation to the whole war effort".

"War housing" is not an unfamiliar sight. It consists of certain very definite types built between 1940 and 1945 to aid in prosecution of the war. As set forth in the Lanham Act, Act of Oct. 14, 1940, c. 862, sec. 1, 54 Stat. 1125, 42 U. S. C., sec. 1521, appropriations were for dwellings

> "in those areas or localities in which the President shall find an acute shortage of housing exists or impends which would impede national defense activities".

Its rows of multi-family dwellings appear at munitions and war-time industrial centers where labor gravitated from peace-time domiciles. Its apartments are readily discernible in Washington, where Government employees multiplied during the war. Its individual houses are clearly distinguished near military camps where officers' families were quartered near installations previously undeveloped.

The post-war emergency legislation which permitted local governments temporarily to utilize barracks was sponsored by Senator Mead.* Both he and Representative Lanham, in the debates on that legislation carefully distinguished "war housing" from "temporary reuse housing" (91 C. R. 11,624-5, 12,303-4).

By respondent's own definition in his Regulations this is not "war housing":

> " 'War housing' means real properties improved with housing structures, acquired or constructed by the Government subsequent to September 8, 1939, either (i) for the purpose of housing servicemen, war workers, and their families, or (ii) by the use

* Act of Dec. 31, 1945, c. 657, 59 Stat. 674, 42 U. S. C. Sec. 1572.

of funds earmarked or appropriated for the housing of persons engaged in national defense activities, and their families" (11 Fed. Reg. 2644).

This housing was neither constructed nor acquired by the Government. It was for veterans, not for servicemen and their families or war workers and theirs; nor was it built with funds earmarked for persons engaged in national defense activities and their families.

D. The fact that it may be said that respondent did not act unreasonably has no bearing on whether the suit is against the United States.

The Court of Appeals shows at length why "We do not think the action taken by appellees was unreasonable" (R. 81) and why it was not "a capricious exercise of power" (R. 82). The reasonableness is said to lie in the breadth of power given to the Administrator. But unless that power is so broad as to allow the officer to nullify the act of Congress, how such reasonableness can alter the situation we cannot perceive.

In *Miguel* v. *McCarl*, 291 U. S. 442 (1934), the disbursing officer relied on an opinion of the Controller General that payment "is not authorized even by the remotest implication of the laws" (p. 449). Presumably, then, his refusal to pay could not be said to be based on an unreasonable construction of the Statutes. Yet, this Court, reading the Statutes differently, issued mandamus directing him to pay from the Government treasury.

In *Santa Fe, etc.* v. *Fall*, 259 U. S. 197 (1922), this Court, through Mr. Justice HOLMES, agreed that "at first sight" the words of the Statute "might be taken to sustain the decision below, but, upon consideration, they seem to us not to have that effect" (p. 199). This Court enjoined the Secretary from his proposed action with respect to land of the United States because his reading of the Statute was wrong, whether or not it was reasonable.

In *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943), Mr. Justice FRANKFURTER wrote:

> "If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the court does come into play, an order may not stand if the agency has misconceived the law."

In *Colgate-Palmolive-Peet* v. *N. L. R. B.*, 338 U. S. 355, 363 (1949), Mr. Justice MINTON wrote:

> "To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the Statute not placed there by Congress."

The fact that the statute, in other respects, leaves discretion in the officer does not remove the question of law from the reviewing power of the Court. As Mr. Justice JACKSON wrote in *Arenas* v. *U. S.*, 322 U. S. 419, 432 (1944):

> "But courts are not to determine questions of Indian land policy, nor can the Secretary on grounds of policy deprive an allottee of any rights he may have acquired in his allotment. * * * Even in some discretionary matters, it has been held that if an official acts solely on grounds which misapprehend the legal rights of the parties, an otherwise, unreviewable discretion may become subject to correction. *Perkins* v. *Elg*, 307 U. S. 325, 349, 83 L. ed. 1320, 59 S. Ct. 884."

In *Land* v. *Dollar* and again in the *Larson* case, this Court recognized that sometimes a preliminary determination must be made before it can be said whether a suit is or is not against the United States. Here the determi-

nation to be made is whether respondent acts within or without the Statute. If without it, his reasonableness is immaterial to the determination of whether this is a suit against the United States.

Miguel v. *McCarl*, 291 U. S. 442 (1934);
Santa Fe, etc. v. *Fall*, 259 U. S. 197 (1922).

POINT III

The matter may be fully disposed of on appeal.

Below, respondents contended that they acted within the Statute. That may be disposed of on the second question on which we seek certiorari.

The only remaining question is whether expiration of the Surplus Property Act while this action was pending, terminated the rights petitioners had when they commenced this suit. The Court of Appeals did not pass on that question (footnote 8, p. 3). We respectfully pray that that question be decided on appeal here so that the whole case may be ended.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

NORMAN WINER,
Counsel for Petitioners.

April 20, 1951.

[APPENDIX FOLLOWS]

APPENDIX A

Statutes

The following is the Statute as it existed after the amendments of 1946. The material within heavy brackets was inserted by the 1946 amendments.

Surplus Property Act of 1944, Act of October 3, 1944, c. 479, Section 23, 58 Stat. 777, 50 U. S. C. App. Section 1632:

"*Disposal of surplus real property*—(a) *Definitions*

As used in this section—

(1) The term 'real property' means property consisting of land, together with any fixtures and improvements thereon [(including hotels, apartment houses, hospitals, office buildings, stores, and other commercial structures)] located outside the District of Columbia, but does not include [(A) commercial structures constructed by, at the direction of, or on behalf of any Government agency, (B) commercial structures which the Administrator determines have been made an integral part of a functional or economic unit which should be disposed of as a whole, and (C)] war housing, industrial plants, factories, [airports, airport facilities,] or similar structures and facilities, or the sites thereof, or land which the Administrator determines essential to the use of any of the foregoing; and

(2) The term 'surplus real property' means real property which has been determined under section 11 [section 1620 of this Appendix] to be surplus property.

(b) *Property to be disposed*

Surplus real property which is not disposed of to Government agencies under section 12 [section 1621 of this Appendix] or to States or their political subdivisions or instrumentalities under section 13 [section 1622 of this Appendix] shall be disposed of in accordance with this section.

(c) *Classification of property*

Immediately after the reporting of surplus real property to the War Assets Administrator under section 11 [section 1620 of this Appendix], the War Assets Administrator shall classify such property as agricultural, grazing, forest, mineral, or otherwise, as it may deem advisable. The classification may be revised from time to time. [The classification of property by the Administrator (including the determination of whether property is 'real property' as defined in this section) shall be based on the highest and best use of the property at the time it is reported as surplus property regardless of its former character or use.]

(d) *Preference to former owner; rights of tenant; price limitation*

(1) (A) In the case of any surplus real property which was acquired by any Government agency after December 31, 1939, the person from whom such property was acquired shall be given notice, in such manner (which may include publication) as the Board by regulation may prescribe, that the property is to be disposed of by the United States and shall be entitled to purchase such property, in substantially the identical tract as when acquired from such person, at private sale at any time during the period of ninety days following such notice: *Provided,* That such period shall be extended in any case when it appears that such extension is necessary or appropriate to facilitate the sale of any surplus real property under this subsection.

(B) In the case of real property acquired by any Government agency after December 31, 1939, which either—

(i) has not been determined under section 11 [section 1620 of this Appendix] to be surplus property, or

(ii) has been disposed of under section 12 [section 1621 of this Appendix] or 13 [section 1622 of this Appendix], or

(iii) is classified as suitable for a purpose different from that for which it was used when ac-

quired by the Government, and with respect to which the person from whom it was acquired has signified an intention not to exercise the privilege granted under subparagraph (A),

the person from whom such property was acquired may be offered other surplus real property in the same area for purchase at private sale, if such other property is classified as suitable for the purpose for which the property so acquired was used when so acquired, and is otherwise similar to the property so acquired.

(2) In the case of surplus real property which was acquired by any Government agency after December 31, 1939, and which is classified as suitable for agricultural use, if any tenant (who was a tenant at the time of acquisition) of the person from whom such property was acquired, signifies, within a period of ninety days following public notice of sale, his intention to purchase such property, and no person has exercised his privilege under paragraph (1) (A), such tenant shall be entitled to purchase such property, in substantially the identical tract as when acquired by such Government agency, at private sale at any time during such ninety-day period.

(3) The price to be paid for surplus real property sold under this subsection shall be a price not greater than that for which it was acquired by the United States, such acquisition price being properly adjusted to reflect any increase or decrease in the value of such property resulting from action by the United States, or a price equal to the market price at the time of sale of such property, whichever price is the lower.

(4) The Board may by regulation prescribe methods for the identification of persons entitled to exercise the privileges conferred by this subsection."

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 698

FRANK SEIDEN, MILTON SEIDEN AND LEON SEIDEN, PETITIONERS

v.

JESS LARSON AND PAUL L. MATHER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The district court did not write an opinion. The opinion of the Court of Appeals (R. 75-82) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 15, 1951 (R. 83). The petition for a writ of certiorari was filed April 25, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Fee title to property owned by petitioners was acquired by the United States during World War II for naval purposes. Part of the property was sold to petitioners pursuant to the Surplus Property Act of 1944 as amended. This suit relates to the remaining portion of the property which was a golf course at the time of acquisition, upon which some $4,000,000 had been expended by the United States in construction of roads, streets, barrack buildings, service buildings, etc., and which is now used for veterans housing. The questions presented are :

1. Whether institution of a suit seeking, in effect, to compel conveyance of this property to petitioners constitutes an attempt to sue the United States without its consent.

2. Whether the administrative determination that this property was not subject to the preferential repurchase right given to former owners by the Surplus Property Act was plainly erroneous.

3. Whether the fact that petitioners had asserted such repurchase right prior to December 31, 1949, empowers the courts now to direct recognition of such right despite repeal of the Surplus Property Act by the Federal Property and Administrative Services Act of 1949 with the proviso that "all priorities and preferences * * * shall continue in effect * * * until December 31, 1949."

STATUTES INVOLVED

The Surplus Property Act of October 3, 1944, 58 Stat. 765, as amended by the Act of August 7, 1946, 60 Stat. 886, provided:

Section 23 (a) (1), 50 U.S.C. App. 1632 (a) (1)—

> (1) The term "real property" means property consisting of land, together with any fixtures and improvements thereon (including hotels, apartment houses, hospitals, office buildings, stores, and other commercial structures) located outside the District of Columbia, but does *not* include (A) commercial structures constructed by, at the direction of, or on behalf of any Government agency, (B) commercial structures which the Administrator determines have been made an integral part of a functional or economic unit which should be disposed of as a whole, and (C) *war housing,* industrial plants, factories, airports, airport facilities, *or similar structures and facilities, or the sites thereof, or land which the Administrator determines essential to the use of any of the foregoing;* * * * [Italics supplied]

* * * * *

Section 23 (c), 50 U.S.C. App. 1632 (c)—

> Immediately after the reporting of surplus real property to the Board under section 11, the Board shall classify such property as agricultural, grazing, forest, mineral, or otherwise, as it may deem advisable. The classification

may be revised from time to time. The classification of property by the Administrator (including the determination of whether property is "real property" as defined in this section) shall be based on the highest and best use of the property at the time it is reported as surplus property regardless of its former character or use.

* * * * *

Section 23 (d) (1) (A), 50 U.S.C. App. 1632 (d) (1) (A)—

(d) (1) (A) In the case of any surplus real property which was acquired by any Government agency after December 31, 1939, the person from whom such property was acquired shall be given notice, in such manner (which may include publication) as the Board by regulation may prescribe, that the property is to be disposed of by the United States and shall be entitled to purchase such property, in substantially the identical tract as when acquired from such person, at private sale at any time during the period of ninety days following such notice: *Provided,* That such period shall be extended in any case when it appears that such extension is necessary or appropriate to facilitate the sale of any surplus real property under this subsection.

* * * * *

Section 34 (b), 50 U.S.C. App. 1643 (b)—

Nothing in this Act shall impair or affect the provisions of * * * Public Law 849, Seventy-

sixth Congress, as amended, respecting war housing and facilities; * * *

* * * * * *

Section 502(a) of the Federal Property and Administrative Services Act of June 30, 1949, 63 Stat. 399, provides:

> There are hereby repealed—
>
> (1) the Surplus Property Act of 1944, as amended (except sections 13 (d), 13 (g), 13 (h), 28, and 32 (b) (2), and sections 501 and 502 of Reorganization Plan Numbered 1 of 1947): *Provided,* That, with respect to the disposal under this Act of any surplus real estate, all priorities and preferences provided for in said Act, as amended, shall continue in effect until 12 o'clock noon (eastern standard time), December 31, 1949;

STATEMENT

This suit was instituted by complaint filed December 29, 1949, for injunctive relief against officials charged with the disposal of surplus property. The case was dismissed upon motion for summary judgment. The facts, as they appear from the complaint and affidavits submitted in connection with the motion, may be summarized as follows:

In 1942 petitioners owned a 169-acre tract on Long Island, New York, upon which they operated a resort hotel, golf course, swimming pools and the like (R. 3). Lido Road, in substance, bisected the

property, some 54½ acres south of the road containing the hotel and some 115 acres north of the road being primarily used for the golf course (See chart opposite R. 28). Condemnation proceedings were instituted on behalf of the Navy Department which culminated in a final judgment in 1945, resulting in acquisition of fee title to the land and improvements and also in the acquisition of furnishing and equipment, $1,300,000 being paid petitioners for the fee title and $232,500 for its use between 1942 and 1945 (R. 40, 57). During occupancy by the Navy some improvements were made to the hotel but most of the changes, amounting to more than $4,000,000, represented the construction of barracks, administrative buildings, streets, highways and similar installations on the former golf course area (R. 41, 58).

After hostilities ceased, the Department of the Navy issued a permit to the Federal Public Housing Authority covering some of the property north of Lido Road and the Authority in turn contracted with the New York State Division of Housing for use of the property for veterans emergency housing (R. 42). That organization converted the barracks, buildings, etc., into structures suitable for family use and the housing project is still in operation (R. 42, 70-72).

The entire property was declared surplus by the Department of the Navy in May 1947 and turned over to the War Assets Administrator, subject to the housing permit mentioned above (R. 41,

56-61). The portion of the property south of Lido Road containing the hotel and beach was classified as "Commercial Section 23", meaning property to which the preference right to repurchase given by the Surplus Property Act applied, and this property was sold to petitioners (R. 43-44). The property north of Lido Road was classified "Non-Section 23—Real Property (War Housing)" meaning that the former-owner priority did not apply because that priority does not apply to "war housing * * * or similar structures and facilities, or the sites thereof, or land which the Administrator determines essential to the use of any of the foregoing;" (*supra*, p. 3) (R. 43, 63). In 1949 some 35 acres of the land north of Lido Road was conveyed to a local school district pursuant to the provision of section 13 of the Surplus Property Act relative to disposal of property for educational uses (R. 45).

In July 1949 petitioners asserted a "former-owner" priority to purchase the land north of Lido Road, and correspondence was exchanged, a hearing was had before the General Board, War Assets, General Services Administration, resulting in reaffirmation of the conclusion that the land was "Non-Section 23" real property (R. 21-27, 44). On December 21, 1949, an advertisement was made soliciting bids until January 10, 1950, subject to the existing occupancy for veterans housing (R. 9-10).

This suit was instituted December 29, 1949, seeking an injunction against the receipt of bids or the taking of any other action directed to transferring title to anyone except petitioners; against permitting anyone to occupy the premises in a manner which would deprive petitioners of their alleged right of immediate possession; and against classifying the property as free of the alleged priority under Section 23 of the Surplus Property Act (R. 5-7). The trial court dismissed the complaint (R. 55). The Court of Appeals affirmed on the grounds that this proceeding constituted an attempt to sue the United States without its consent (R. 77-79) and, alternatively, that the administrative conclusion was not a capricious exercise of power (R. 79-82). It found it unnecessary to decide whether as a result of the termination of priorities on December 31, 1949, petitioners lost whatever standing they had to prosecute this suit (R. 77, fn. 8).

ARGUMENT

1. Recognizing that the purposes to be served by the system of priorities and preferences relating to surplus property resulting from World War II had been accomplished, Congress terminated those priorities on December 31, 1949. It is thus plain that the issue whether such priority was erroneously denied in the instant case does not present an important question warranting review by this Court. Moreover, the decision below is clearly correct.

2. Title to the property here involved is admittedly in the United States. And, as the court below stated (R. 79), the ultimate relief sought by petitioners, while expressed in negative terms, is conveyance of the property to them. It is settled that such a proceeding constitutes a suit against the United States. *Minnesota* v. *Hitchcock,* 185 U. S. 373, 388; *Mine Safety Co.* v. *Forrestal,* 326 U. S. 371; *Morrison* v. *Work,* 266 U. S. 481. The language of *Larson* v. *Domestic & Foreign Corp.,* 337 U. S. 682, concerning "common law wrongs" (Pet. 7), does not aid petitioners since the court was there discussing cases where the plaintiff claimed title and hence, absent justification of governmental authority, the defendant officers would be committing a trespass.

Petitioners rely (Pet. 8-10) upon cases such as *Santa Fe Pac. R. R. Co.* v. *Fall,* 259 U. S. 197, and *Payne* v. *Central Pac. Ry Co.,* 255 U. S. 228, where relief was available by means of mandamus because the Government officer was under a ministerial duty to dispose of government property in a particular manner. As will more fully appear from our discussion of the merits, *infra,* this case presents a situation where the administrative officer is vested with discretion and his determination is not plainly wrong. In such cases mandamus does not lie. *Wilbur* v. *United States,* 281 U. S. 206, 218-219; *Work* v. *Rives,* 267 U. S. 175, 177-178; *Hall* v. *Payne,* 254 U. S. 343, 347-348; *Riverside Oil Co.*

v. *Hitchcock*, 190 U. S. 316, 324-325. Petitioners approach this case as if Congress had granted judicial review of the administrative determination. Thus, they rely on *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80 (Pet. p. 24) and *United States* v. *Idaho*, 298 U. S. 105, where the statutes specifically provided for judicial review.[1] The limited nature of review of determinations relating to the disposal of surplus property is emphasized by the fact that such determinations were excluded from the operation of the judicial review provisions of the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. 1001(a).

3. The exclusion of this property from the "former owner" priority was clearly proper. The Surplus Property Act (sec. 23(c)) vested in the Administrator the duty of classifying surplus property "including the determination of whether property is 'real property' as defined in this section". The administrative discretion was further emphasized by the provisions that the classification "shall be based on the highest and best use of the property at the time it is reported as surplus property regardless of its former character or use" and that the classification "may be revised from time to time". This property, though originally a golf course, had been improved through the ex-

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[1] *Arenas* v. *United States*, 322 U. S. 419 (Pet. p. 24) was a suit brought under a special act vesting the courts with jurisdiction over the subject matter.

penditure of some $4,000,000 by housing structures. At the time it was declared surplus in 1947 and when the classification was reviewed in 1949, it was occupied for housing veterans and their families. As the court below concluded (R. 82), the conclusion that the term "war housing * * * or similar structures and facilities" included this property "would seem to be well founded".

Petitioners' attack upon the administrative conclusion is based almost entirely on a very narrow reading of the term "war housing" as housing constructed under the Lanham Act (Pet. 20-23). Such a view would simply read the phrase "war housing" out of section 23 of the Surplus Property Act since section 34(b) of the Act excluded Lanham Act housing from all the provisions of the Act. And, as the court below noted (R. 81, fn. 14), a substantial amount of housing for defense and war purposes was constructed under statutes other than the Lanham Act. With the many facets of the surplus property program in mind (cf. R. 80), the exclusion of the property north of Lido Road from the former-owner priority was clearly correct.[2]

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[2] Petitioners now say that they do not seek to curtail the occupancy for veterans housing (Pet. 4). However, in their complaint (R. 4-5) they alleged that such occupancy was contrary to the Surplus Property Act and that they were entitled to immediate possession and such is the logical result of acceptance of their argument. And although not directly involved in this case, their argument would, it seems, as alleged in the complaint (R. 4), likewise invalidate the conveyance to the local school district.

4. While this issue was not found necessary to the decision below, it is clear that petitioners now have no priority rights to purchase this government property. In an unambiguous provision, Congress terminated "all priorities and preferences" on December 31, 1949. No exception was made for cases where an alleged right had been asserted either in administrative proceedings or in the courts. Former owners are now in the same position as any other prospective purchaser of the property.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY, 1951.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1950

No. 698

FRANK SEIDEN, MILTON SEIDEN and LEON SEIDEN,

Petitioners,

against

JESS LARSON and PAUL L. MATHER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

NORMAN WINER,
ALFRED B. NATHAN,
Of Counsel.

JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6 182

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PETITIONERS' REPLY BRIEF

I

The most significant aspect of respondents' brief in opposition is its almost complete disregard of the ground of decision in the Court of Appeals which is the basis upon which certiorari is sought.

As to the major ground below, namely, that where title to property is in the United States, relief sought with respect to the property constitutes an action against the United States, all respondents have to say (p. 9) is that "It is settled that such a proceeding constitutes a suit against the United States". Of the eight cases cited at

pages 8 and 9 of the petition specifically granting relief despite the contention that the suit was against the sovereign, respondents do not mention six of them. As to the other two, the *Santa Fe* and *Payne* cases, respondents say that mandamus was available because the cases involved "a ministerial duty to dispose of government property in a particular manner" (p. 9). Merely characterizing that duty as "ministerial" does not distinguish those cases from the principal case. The duty of the respondents to convey the government property in the principal case in accordance with the explicit statutory direction was certainly no less ministerial than the duty to convey the government property in the *Santa Fe* and *Payne* cases in accordance with the statutes there involved.

In short, respondents fail to meet the issue or to distinguish the numerous cases in which specific relief has been granted with respect to property title to which was in the United States.

II

As to the alternative ground below, that an error of law by respondents in construing their own statutory authority makes the case one against the United States, respondents say nothing. And this despite the fact that the Court below stated specifically that however it might have determined "the question in the first instance", the case fell within the *Larson* doctrine (R. 82).

III

The object of the brief in opposition is to show that petitioners cannot win on the merits even if they are given a hearing on the merits. Thus, it is repeated that respondents had the duty to classify surplus property (p. 10) and,

therefore, had the right to classify this property as "war housing." We went into this matter at pages 15 to 23 of the petition at such length as we believed appropriate in a petition for certiorari. We pointed out there that what respondents attempted to do here is not to classify the property but to re-define a term used by Congress, a term of common significance, with a legislative history which does not admit of the distortion sought by respondents. Therefore, we respectfully submit that if this case were considered on the merits, the determination below could not be sustained.

IV

As further support for freedom of action by respondents, it is said that the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 5 USC 1001(a), does not provide for judicial review of the decision of this administrator (p. 10). There may have been many reasons for this, but it is evident that one good reason is that the Administrative Procedure Act is designed to cover cases of regulatory federal commissions and similar bodies which hold hearings, weigh evidence and reach decisions governing the conduct of citizens. By not providing for such agencies as this, Congress did not manifest an intent that this agency or any like it should escape review in the courts and have arbitrary power whereas regulatory commissions, which do have forms and procedures amounting to due process, should be restricted.

V

Respondents say that the termination of priorities on December 31, 1949 is relevant for two reasons: (1) such rights as petitioners had have been lost, and (2) this is

a non-recurrent case which the court is not justified in reviewing.

The answer to the first proposition is that the rights of these petitioners were not lost. According to respondents' own Regulations:

> "Offers from priority holders at their respective established considerations shall be accepted in the order of their priority. * * * Disposal agencies may reject any offer which is below the fair value of the property *other than an offer from a priority holder* for the maximum consideration established for a transfer to such a priority holder." (Italics ours.) (13 Fed. Reg. 4736, 4743.)

Thus, before the expiration of the statute, petitioners had exercised their priority and their offer could not be rejected. Here as in the *Santa Fe* case and in the *Payne* case, the rights of petitioners were fully vested before the termination of the priorities. (This is wholly apart from such bearing as the wilfullness on the part of respondents in delaying the advertisement to a time when they thought petitioners would not be able to exercise their priority, may have.)

We are not in position to know how many similar cases there are under this statute or how many there are or may be under other statutes. But the question on which certiorari is sought is not limited to the Surplus Property Act or any other particular act. The ruling of the Court of Appeals was that this was a suit against the United States and therefore that the merits cannot be reached. That, as we have demonstrated in our petition, is a recurrent question and one which is of wide general importance.

VI

Finally, respondents, at no fewer than three places (pp. 2, 6 and 11), point out that the United States spent some $4,000,000 on this property. The fact is that the property was not improved by the expenditure any more than the country was enriched by the millions of dollars expended on exploded and unexploded shells during the war. Respondents did not bring to the Court's attention the fact that the record shows, without dispute, that the expenditures by the United States have resulted in a decrease, rather than an increase, in the land value (R. 34, 38).

That this statement by petitioners' expert was sound was borne out when the bids were subsequently opened and it was found that the highest legitimate bid, apart from petitioners' bid, was $91,500 for the land on which the United States had expended these $4,000,000 (R. 48). Of course, petitioners' bid of $125,000 took into account the special value of the land to petitioners.

Conclusion

It is respectfully submitted that the brief in opposition has completely avoided the issue of whether this Court should review the holding that this is a suit against the United States. It is respectfully submitted that the decision below is contrary to the decisions in numerous cases decided by this Court, cases which respondents do not even attempt to distinguish. Respondents' arguments that certiorari should not be granted because, in any event, respondents would be sustained on the merits, cannot be properly considered on this petition where the matter cannot be fully explored; but we respectfully submit that there

is no reason to believe that respondents are right on the merits; on the contrary there is every reason to believe that they are wrong. Respondents have wilfully brought petitioners' property into a statutory definition which cannot possibly include that property. Under respondents' own Regulations petitioners' offer to repurchase in accordance with the statute was an offer which could not be rejected and thus vested and survived the lapse of the statute.

The question before the Court—presented by the adjudication below—is whether this is a suit against the United States. That is the only question resolved by the Court of Appeals. We respectfully submit that this question should be determined here.

Respectfully submitted,

May 25, 1951.

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